

JASON E. BAKER, Bar No. 197666  
PETER KARVELIS, Bar No. 216299  
BRENT JEX, Bar No. 235251  
KEEGAN & BAKER, LLP  
4370 La Jolla Village Drive, Suite 640  
San Diego, CA 92122  
Telephone: 858.552.6750  
Facsimile: 858.552.6749

Attorneys for Plaintiffs KEVIN HERNANDEZ  
AND RAPHAEL CERVANTES, and Class  
Members

JOHN S. ADLER, Bar No. 060398  
LITTLER MENDELSON  
A Professional Corporation  
501 W. Broadway, Suite 900  
San Diego, CA 92101.3577  
Telephone: 619.232.0441  
Facsimile: 619.232.4302

Attorneys for Defendants  
DIAMOND ENVIRONMENTAL SERVICES, LLC  
AND ERIC DE JONG

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN DIEGO – NORTH COUNTY

KEVIN HERNANDEZ and RAPHAEL  
CERVANTES, individually and on behalf  
of all other persons similarly situated and  
on behalf of the general public,

Plaintiffs,

v.

DIAMOND ENVIRONMENTAL  
SERVICES, LLC, a California limited  
liability company; ERIC DE JONG, an  
individual; and DOES 1 through 100,  
inclusive,

Defendants.

Case No. 37-2007-00051019-CU-OE-NC

Assigned to:  
The Honorable Michael M. Anello  
Dept. N-29

**STIPULATION AND AGREEMENT  
TO SETTLE CLASS ACTION**

Complaint Filed: March 12, 2007

IT IS HEREBY STIPULATED AND AGREED, by and among the undersigned  
parties, subject to the approval of the Court pursuant to Section 382 of the California Code of Civil  
procedure and Rule 1859 of the California Rules of Court, that the settlement of this action shall be  
effectuated upon and subject to the following terms and conditions.

**I. DEFINITIONS**

**A. Terms**

Unless otherwise defined herein, when capitalized, the following terms used in this Agreement shall have the meanings ascribed to them as set forth below:

1. "Agreement" or "Settlement Agreement" means this Stipulation and Agreement to Settle Class Action, including the Exhibits attached hereto.

2. "DES" means the named defendant, Diamond Environmental Services, Inc., including its President and named individual defendant Eric de Jong, as well as any related entity, representative, or person described in Section V.B., Class Member Release.

3. "Claim Form" means the written application entitled Claim Form that Class Members must timely complete and submit to the Settlement Administrator in order to receive any portion of the Settlement Amount. Class Members who fail to timely return a completed Claim Form will not receive any portion of the Settlement Amount. All Claim Forms must be postmarked to the Settlement Administrator as set forth in Section III.C.4.c of this Agreement entitled Submission of Claim Form. Claim Forms shall be prepared in both Spanish and English.

3. "Claim Period" means: December 11, 2003, through May 7, 2006.

4. "Class" or "Class Members" means the conditionally certified class defined herein by the parties: All individuals who worked for DES as pumper drivers at any time from December 11, 2003, through May 7, 2006, who have not opted out of the Litigation or otherwise independently resolved their claims.

5. "Class Counsel" means: Jason E. Baker, Esq., Peter Karvelis, Esq. and Brent Jex, Esq. of Keegan & Baker, LLP, 4370 La Jolla Village Drive, Suite 640, San Diego, CA 92122.

6. "Class Member Information" means: a listing of all Class Members including his/her last known address; social security number; the total number of weeks worked during the Claim Period by him/her without regard for (i) periods of time worked during the Claim Period in a non-pumper driver capacity, if any, and (ii) time taken off during the Claim Period for vacation, sick days, leaves of absence, or for any other reason.

1                   7.     “Complaint” means the Complaint filed by Plaintiffs Kevin Hernandez and  
2     Raphael Cervantes in the Litigation on March 12, 2007.

3                   8.     “Court” means the Superior Court for the County of San Diego, State of  
4     California, North County Judicial District.

5                   9.     “Defendant” means Diamond Environmental Services, Inc. and Eric de Jong,  
6     as well as any related entity, representative, or person described in Section V.B., Class Member  
7     Release.

8                   10.    “Defense Counsel” means: John S. Adler, Esq., of Littler Mendelson, P.C.,  
9     501 W. Broadway, Suite 900, San Diego, CA 92101.

10                  11.    “Dispute Letter” means written notice from a Class Member to the Settlement  
11    Administrator contesting the information stated in the Claim Form about the Class Member and  
12    describing all of the reasons therefore, along with any other documentation provided by the Class  
13    Member. All Dispute Letters must be postmarked to the Settlement Administrator on or before the  
14    date set forth in Section III.C.4.d of this Agreement, entitled Submission of Dispute Letter.

15                  12.    “Effective Date” means the date the settlement becomes effective. In the  
16    event that no objections are made to the settlement, the Effective Date shall be the date of Final  
17    Approval of the Settlement. If an objection is filed which is not withdrawn and no appeal is filed,  
18    the Effective Date shall be seventy (70) days after the date of Final Approval of the Settlement. If an  
19    appeal is filed, the Effective Date shall be when such appeal is dismissed, or the judgment is finally  
20    affirmed and all further appeal rights are either waived and released or time barred, or in  
21    conformance with further court order(s).

22                  13.    [Intentionally left blank.]

23                  14.    “Litigation” means the lawsuit filed on March 12, 2007, *Hernandez, et al. v.*  
24    *Diamond Environmental Services, Inc., et al.*, and pending in the Superior Court of the County of  
25    San Diego – North County, entitled Case No. 37-2007-00051019-CU-OE-NC.

26                  15.    “Maximum Settlement Payout” means the amount of Four Hundred Forty  
27    Thousand and No/100 Dollars (\$440,000.00), which is the maximum sum to be paid out by  
28    Defendant pursuant to this settlement, the only exception(s) being (1) the costs and expenses of the

1 Settlement Administration as set forth in detail herein; and (2) the employer's required payroll  
2 employment taxes.

3 16. "Parties" mean Defendant, Plaintiffs, and Class Members as defined in  
4 subparts 4, 9 and 16 herein.

5 17. "Plaintiffs" means Kevin Hernandez and Raphael Cervantes.

6 18. "Settlement Administrator" means: CPT Group, Inc.

7 19. "Settlement Amount" means the actual amount to be paid out, and will be  
8 based on the number of Class Members who submit valid claim forms, and the Court's rulings on (a)  
9 Class Counsel's fee request, and (b) Plaintiffs' incentive fee request. The cost of administration of  
10 the settlement shall not be included as part of the Settlement Amount nor shall it be included as part  
11 of the "Maximum Settlement Payout" herein. At no time shall the Settlement Amount herein stated  
12 exceed the Maximum Settlement Payout.

## 13 **II. FACTUAL BACKGROUND**

### 14 **A. Plaintiffs' Allegations And Proceedings**

15 Plaintiffs Kevin Hernandez and Raphael Cervantes filed a lawsuit on behalf of all  
16 current and former Pumper Drivers of DES who worked at DES from March 12, 2003 to the present.  
17 Plaintiffs contend that DES misclassified the Pumper Drivers as salaried employees exempt from  
18 certain California wage and hour laws, and that they should have been classified as non-exempt  
19 employees, subject to those California wage and hour laws. Plaintiffs allege that the DES Pumper  
20 Drivers are entitled to overtime wages for all hours worked in excess of 8 hours per day and/or  
21 40 hours per week. Plaintiffs also allege that the DES Pumper Drivers were improperly denied meal  
22 and/or rest periods. Plaintiffs also allege that the DES Pumper Drivers were not provided with  
23 proper wage statements. Plaintiffs also allege entitlement to Labor Code section 203 penalties,  
24 interest, attorneys fees, restitution for unlawful business practices under California Business &  
25 Professions Code section 17200 et seq., and other related matters.

26 Defendant denies Plaintiffs' allegations, denies any wrongdoing or legal liability for  
27 overtime wages, missed meal and/or rest periods, improper wage statements, penalties, and any other  
28 matter, and denies that any employee, including Pumper Drivers and specifically including Plaintiffs

1 were improperly or illegally treated in any respect. DES also denies that any employee, including  
2 Pumper Drivers and specifically including Plaintiffs have incurred any damages. Defendant further  
3 denies that this matter is appropriate for class action adjudication on various grounds including the  
4 lack of commonality or typicality of claims and that individual claims predominate.

5 No class has been certified in the case.

6 Since the commencement of the litigation, Class Counsel and Defense Counsel have  
7 worked cooperatively to analyze this case at an early time through significant informal discovery and  
8 informal fact finding to investigate the factual and legal strengths and weaknesses of this case, have  
9 reviewed and evaluated relevant documents, and have engaged in extensive legal research and  
10 analysis regarding the Parties' respective positions on the issues raised by the Complaint. An  
11 extensive number of witnesses were interviewed by Class Counsel and by the Department of Labor  
12 during its related investigation of Defendant and these witness statements provided substantial  
13 factual support for the settlement position of the parties herein.

14 **B. Settlement Negotiations**

15 On June 27, 2007, the Parties participated in a private mediation before Michael J.  
16 Roberts, Esq. of ADR Services, Inc. Attorney Roberts is an experienced, highly-regarded mediator  
17 in San Diego County. Despite mediation efforts covering more than ten (10) hours that day, the  
18 Parties did not settle the case that day, but continued settlement negotiations and discussions  
19 thereafter. Since then, the Parties have reached an agreement with respect to all core settlement  
20 terms and have reached this Stipulation.

21 Plaintiffs and Class Counsel have concluded, after taking into account disputed  
22 factual and legal issues involved in this litigation, the risks attending further prosecution, and the  
23 substantial benefits received and to be received pursuant to the compromise and settlement of the  
24 litigation, that settlement on the terms hereinafter set forth is in the best interest of Plaintiffs and the  
25 Class. Defendant and Defense Counsel have concluded, after taking into account the disputed  
26 factual and legal issues involved in the litigation, the risks attending further defense, the substantial  
27 expense and burden of protracted litigation, and their desire to put the controversy to rest, that  
28 settlement on the terms hereinafter set forth is in the best interest of Defendant.



This Settlement was agreed to after lengthy arms-length negotiations by the Parties. As more particularly set out in the Settlement Agreement, this Settlement contemplates: (1) the entry of an Order of Final Approval and Good Faith Determination of Settlement granting relief to Class Members as set forth in this Agreement; (2) the entry of Judgment and Dismissal of the Complaint and the litigation with prejudice as to all Defendants; and (3) the discharge of all Defendants' liability for any claims raised in the litigation.

### **III. APPROVAL AND IMPLEMENTATION OF THE SETTLEMENT**

The Parties and their respective counsel shall take all steps that may be requested by the Court relating to the approval and implementation of this Settlement and shall otherwise use their respective best efforts to obtain Court approval and implement this Settlement. The process for obtaining Court approval of and implementing this Settlement shall be as follows:

#### **A. Preliminary Approval By The Court**

Promptly after the execution of this Settlement, Class Counsel and Defense Counsel shall jointly submit to the Court a Motion for Preliminary Approval of Proposed Settlement, Temporary and Conditional Certification of Class for Settlement Purposes, and Setting Hearing on Proposed Settlement, and Memorandum of Points and Authorities In Support Thereof, and a Stipulation and [Proposed] Order In Support Thereof. The Court's preliminary approval of this Settlement shall be embodied in the Order of Preliminary Approval of Proposed Settlement, Temporary and Conditional Certification of Class for Settlement Purposes, and Setting Hearing on Proposed Settlement, in the form attached hereto as Exhibit C ("Order of Preliminary Approval"), which shall be served by Class Counsel on Defendant.

#### **B. Conditional Certification Of The Class**

No class has been certified in the Litigation. Based upon discovery conducted in the Litigation and the negotiations and investigation described above, the Parties have agreed to conditionally certify for settlement purposes only the Class to be comprised of:

All individuals who worked for Defendant as a Pumper Driver at any time from December 11, 2003, through May 7, 2006, who have not opted out of the Litigation or otherwise independently resolved their claims. The Class shall not include those persons who did not actually work one day or more during the Class Period as a Pumper Driver.

The stipulation to certify the Class is contingent upon final approval of this Agreement by the Court and is made for settlement purposes only. If the Settlement is not approved and does not become final, for whatever reason, the Parties shall stipulate to decertification of the Class without prejudice to the propriety of class certification being adjudicated on the merits, and all documents, motions and declarations submitted with respect to this Agreement shall have no force or effect and shall be inadmissible in any further proceeding in this case.

### **C. Notice To Class Members**

The Settlement Administrator shall disseminate the Notice Of Order Certifying Class and Pendency Of Settlement Of Class Action And Approval Process – Claim Form Attached (the “Class Notice” and the “Claim Form”), which the parties will ask the Court to approve in the form attached hereto as Exhibit A (Class Notice) and Exhibit B (Claim Form), by giving notice by first-class United States mail as described in this Section.

#### **1. Listing Of Class Members**

Within fifteen (15) days of the signing of the Order of Preliminary Approval (Exhibit C), Defendant will prepare and provide to the Settlement Administrator the Class Member Information. Defendant will certify that all of the information set forth in said listing is complete and accurate to the best of its knowledge and information. Defendant shall also provide to Class Counsel this Class Member Information with each member identified only by his/her initials and the last four numbers of his/her social security number.

#### **2. Notice By Mail**

Class Notice shall be provided to Class Members in the following manner: within twenty (20) days of receipt of the Class Member Information, as provided by Paragraph III.C.1. above, the Settlement Administrator shall mail the Class Notice to the last known address of every respective Class Member by first-class United States mail, postage prepaid. The date of this initial mailing of the Class Notice shall be referred to herein as the Original Mailing Date. In the event the Class Notice is returned as undeliverable by the Post Office, the Settlement Administrator shall perform an address search and if a more recent address is discovered, shall remail the Class Notices. In no such event shall additional time be allowed for a response by the Class Member. Compliance

1 with the procedures described in this Section III.C.2 shall constitute due and sufficient notice to  
2 Class Members of the pendency of the Litigation, this Settlement, and the Final Fairness and  
3 Approval Hearing, and shall satisfy the requirement of due process.

### 4 **3. Declaration Of Compliance**

5 The Settlement Administrator shall perform the duties and services set forth in  
6 Section III.E.2.

7 Within fifty (50) days of receipt of the Class Member Information, the Settlement  
8 Administrator shall provide Counsel for the Parties with a declaration attesting to completion of the  
9 notice process, including the duties and services set forth in Sections III.C.2 and III.E.2(a-d). For  
10 privacy reasons, the declaration shall not include the addresses or other identifying information of  
11 the Class Members. Class Counsel shall file the declaration with the Court within five (5) days after  
12 receipt of the declaration. At no time shall any Class Member's address or social security number be  
13 filed with the court.

### 14 **4. Responses To The Notice**

#### 15 **a. Objections To The Settlement**

16 Any Class Member wishing to object to the approval of this Settlement shall inform  
17 the Court and Counsel for the Parties in writing of his or her intent to object by following the  
18 procedure set forth in the Class Notice such that the objection is timely filed with the Court and  
19 mailed to Class Counsel and Defense Counsel no later than forty-five (45) days following the  
20 Original Mailing Date of the Class Notice. Any Class Member who fails to file such a written  
21 statement of his or her intention to object shall be foreclosed from making any objection to this  
22 Settlement.

#### 23 **b. Opting Out Of The Class**

24 Any Class Member who elects not to participate as a Class Member shall make that  
25 election by following the procedure set forth in the Class Notice such that the written request for  
26 exclusion is postmarked no later than forty-five (45) days following the Original Mailing Date of the  
27 Class Notice. Any Class Member who fails to opt out of the Class in compliance with the procedure  
28 set forth in the Class Notice shall automatically be deemed a Class participant whose rights and



1 claims with respect to the issues raised in the Complaint are determined by the Court's order and  
2 rulings in the Litigation.

3 **c. Submission of Claim Form**

4 All Claim Forms must be postmarked and mailed to the Settlement Administrator no  
5 later than forty-five (45) days following the Original Mailing Date of the Class Notice. If a timely  
6 submitted Claim Form is deficient in any aspect, the Settlement Administrator shall send the  
7 claimant one (1) letter advising of the deficiency and allowing for fifteen (15) days to correct the  
8 deficiency or until forty-five (45) days following the Original Mailing Date of the Class Notice,  
9 whichever is later.

10 **d. Submission of Dispute Letter**

11 Any Class Member who wishes to dispute the information used to determine the  
12 Class Member's eligibility to receive any portion of the Settlement Amount, or the information used  
13 to calculate the number of workweeks or amount of that Class Member's portion of the Settlement  
14 Amount, must do so not later than forty-five (45) days following the Original Mailing Date of the  
15 Class Notice, by mailing a Dispute Letter to the Settlement Administrator. The Settlement  
16 Administrator shall notify and confer with Class Counsel and Defense Counsel about the dispute and  
17 shall provide any relevant information in its possession which may assist in a resolution, after which  
18 the Settlement Administrator, in its sole discretion, shall decide the issue of the dispute.

19 **D. Fairness And Approval Hearing**

20 On or about ninety (90) days following the Original Mailing Date of the Class Notice,  
21 or as otherwise set by the Court, a Final Fairness and Approval Hearing shall be held before the  
22 Court in order to: (1) review this Settlement and determine whether the Court should give final  
23 approval to this Settlement and Class Counsel's Motion for Approval of Attorneys' Fees and Costs  
24 Allocation; and (2) to consider any timely objections made pursuant to Section III.C.4 and all  
25 responses to objection by the Parties. At the Final Fairness and Approval Hearing, the Parties shall  
26 ask the Court to give final approval of this Settlement.

**E. Settlement Payment Procedures**

**1. General Description Of Settlement**

This Litigation shall be settled and resolved for a Maximum Settlement Payout of Four Hundred Forty Thousand and No/100 Dollars (\$440,000.00). The Maximum Settlement Payout shall be all inclusive of, and shall apply to cover, all relief to be paid to settlement Class Members, all amounts paid to Plaintiffs' counsel for attorneys' fees, expert fees, costs and any other expense, any enhancement or incentive payment for Plaintiff Hernandez and/or Plaintiff Cervantes, and any and all other fees and costs associated with this class settlement (except for the fees and costs of the Settlement Administrator and the employer's share of applicable payroll taxes, if any). The actual amount to be paid out, the Settlement Amount, will be based on the number of claims made but in no case will it exceed the Maximum Settlement Payout less Court-approved attorneys fees and Court-approved incentive payment(s). No settlement fund shall be created in connection with the resolution of this case. Any and all costs of administering the class settlement, including notifying the class of the settlement and claims administration, shall not be included in this Settlement Amount and shall be borne by Defendant.

**2. Administrative Services And Costs**

The Settlement Administrator will be retained to provide the following administrative services:

(a) Establishing a computerized database of the Class Member Information, to be provided by Defendant to the Settlement Administrator in electronic form. Prior to mailing the notices, the Settlement Administrator may verify the last known addresses for each known Class Member through a national change of address system (compiled by and available from the U.S. Postal Service).

(b) Printing and mailing the Class Notice, including the Claim Form, to each Class Member.

(c) Establishing and maintaining a toll free English and Spanish speaking informational telephone support line to assist Class Members who have questions regarding the Class Notice or the Claim Form.

(d) Conducting additional address searches for mailed Class Notices returned as undeliverable. These searches may be done through a class action locator service using the Class Member's social security number. To the extent new and more current addresses are found, the Settlement Administrator will also reprint and remail Class Notices accordingly.

(e) Receiving, calculating, and processing claims from Class Members, including the duties set forth in Section III.E.7 and, if applicable, Section III.E.6. This service will include claim amount calculations, printing and issuance of checks and preparation of W-2 and/or 1099 Forms. Basic accounting for and payment of employee tax withholdings will also be included as part of this service.

The total cost of administering the Settlement is estimated to be \$15,000.00. The cost of the Settlement Administrator shall be paid directly by Defendant and is not part of the Maximum Settlement Payout.

### **3. Attorneys' Fees And Court Costs**

The total value of the settlement is \$515,000.00, inclusive of all payments to Class Members, attorneys fees, costs, and settlement administration, if all Class Members submit a valid and timely Proof of Claim form. Additionally, Class Members have received a benefit of approximately \$350,000.00 from settlement of claims handled by the United States Department of Labor in or around December, 2006.

Class Counsel will apply to the Court for an order awarding attorneys' fees and costs incurred to prosecute the action to be paid from the Maximum Settlement Payout in an amount not to exceed One Hundred Fifty-Eight Thousand Dollars (\$158,000.00) (31% of the total settlement value) and reimbursement of actual costs incurred, to be paid from the Maximum Settlement Payout not to exceed Ten Thousand Dollars (\$10,000.00). So long as Class Counsel does not seek more than these stated sums, and does not present any information to the court that is reasonably believed to misrepresent the facts and occurrences in this matter, Defendant has agreed not to oppose said motion for fees and costs. As a condition of this Settlement, Class Counsel have agreed to seek their fees only in the manner prescribed by this Agreement. Within the above-stated total settlement value is included the sum of Sixty Thousand Dollars (\$60,000.00) which was paid to achieve the full

1 and complete settlement of the United States District Court, Southern District of California case  
 2 entitled Mendoza, et al. v. Diamond Environmental Services, LLC, et al., Case No. 07-CV-0056-  
 3 BTM (POR), which prior to removal to federal court on January 9, 2007, was designated San Diego  
 4 North County Superior Court Case No. GIN 057664. Also included within the above-stated total  
 5 settlement value is the estimated cost of administering the Settlement (\$15,000.00).

6 Attorneys' fees and costs to Class Counsel are permitted under California Labor Code  
 7 section 1194, *et seq.*, and possibly other California laws. The amounts requested will be and are  
 8 intended to cover all work performed by Class Counsel to date and all work to be performed in  
 9 connection with the approval by the court of this Agreement and the final conclusion of this action.

10 Within thirty (30) days of the Effective Date, Defendant shall tender payment of the  
 11 court-ordered fees and costs to Class Counsel.

12 Should the Court award fees and costs in an amount less than One Hundred Fifty-  
 13 Eight Thousand Dollars (\$158,000.00), and/or costs in an amount less than Ten Thousand Dollars  
 14 (\$10,000.00) the difference between said maximum sums and the amounts actually awarded by the  
 15 Court shall remain part of the Maximum Settlement Payout and shall serve to enhance the financial  
 16 distribution to Class Members.

17 Recovery of fees and costs is not a condition to this Agreement, and is to be  
 18 considered by the Court separately from the fairness, reasonableness, adequacy, and good faith of  
 19 the Settlement. Any order or proceedings relating to the application by Class Counsel of an award of  
 20 attorneys' fees and costs, or any appeal from any order relating thereto or reversal or modification  
 21 thereof, shall not operate to terminate or cancel the Agreement, or affect or delay the finality of the  
 22 Dismissal, Judgment, and Order of Final Approval of the Settlement, as set forth herein.

#### 23 **4. Settlement Sum Payable To Named Plaintiffs**

24 In lieu of any and all other monies and benefits under the terms of the settlement,  
 25 within thirty (30) days of the Effective Date, Defendant shall provide to Class Counsel payment for  
 26 Plaintiff Kevin Hernandez in the gross amount of Twenty Thousand Dollars (\$20,000.00) from the  
 27 Maximum Settlement Payout. Should the Court reduce the amount of the payment to Plaintiff  
 28 Hernandez, this shall not operate to terminate or cancel the Agreement, or affect or delay the finality



1 of the Dismissal, Judgment, and Order of Final Approval of the Settlement. Should the Court reduce  
2 the amount of payment provided to this named Plaintiff and Class Representative, the difference  
3 between the amount stated herein and the amount awarded shall remain part of the Maximum  
4 Settlement Payout and shall serve to enhance the financial distribution to Class Members.

5 In consideration of this separate payment, Plaintiff Kevin Hernandez agrees to release  
6 any and all claims, known and unknown, against all Defendants. In addition, Kevin Hernandez agrees  
7 not to apply for or accept employment with Defendant at any time in the future. Of this total amount,  
8 Ten Thousand Dollars (\$10,000) shall be allocated to the payment of unpaid wages and shall be subject  
9 to applicable taxes and withholdings. The remaining amount shall be allocated to penalties, interest, and  
10 consideration for Kevin Hernandez's participation in this case as a Plaintiff and for his global release of  
11 claims and agreement not to apply or accept employment with Defendant in the future.

12 In lieu of any and all other monies and benefits under the terms of the settlement,  
13 within thirty (30) days of the Effective Date, Defendant shall provide to Class Counsel payment for  
14 Plaintiff Raphael Cervantes in the gross amount of Twenty Thousand Dollars (\$20,000.00) from the  
15 Maximum Settlement Payout. Should the Court reduce the amount of the payment to Plaintiff  
16 Cervantes, this shall not operate to terminate or cancel the Agreement, or affect or delay the finality  
17 of the Dismissal, Judgment, and Order of Final Approval of the Settlement. Should the Court reduce  
18 the amount of payment provided to this named Plaintiff and Class Representative, the difference  
19 between the amount stated herein and the amount awarded shall remain part of the Maximum  
20 Settlement Payout and shall serve to enhance the financial distribution to Class Members.

21 In consideration of this separate payment, Plaintiff Raphael Cervantes agrees to  
22 release any and all claims, known and unknown, against all Defendants. In addition, Raphael  
23 Cervantes agrees not to apply for or accept employment with Defendant at any time in the future. Of  
24 this total amount, Ten Thousand Dollars (\$10,000) shall be allocated to the payment of unpaid  
25 wages and shall be subject to applicable taxes and withholdings. The remaining amount shall be  
26 allocated to penalties, interest, and consideration for Raphael Cervantes' participation in this case as  
27 a Plaintiff and for his global release of claims and agreement not to apply or accept employment  
28 with Defendant in the future.



## 5. Settlement Amounts Payable To Class Members

This remainder of the Maximum Settlement Payout (after payment of Class Counsel's court-approved fees and costs, and the court-approved settlement sums to the named Plaintiffs) is currently estimated to be approximately Two Hundred Forty-Two Thousand Dollars (\$242,000.00). This sum will be divided as follows: (a) for each qualifying workweek between the period December 11, 2003 and May 7, 2004, the Class Member shall be awarded two (2) compensation units; and (b) for each qualifying workweek between the period May 7, 2004 and May 7, 2006, the Class Member shall be awarded one (1) compensation unit. The basis for this distinction is explained at Section III.F., *infra*. The remainder of the Maximum Settlement Payout will be divided by the total number of compensation units to determine a dollar value for each compensation unit, from which each Class Member will receive the sum of the unit dollar value times the number of compensation units.

Qualifying workweeks are determined by identifying the total number of two-week pay periods worked by each Class Member during the Claim Period and dividing by two. The Class Member must have worked or been paid for at least one day during a week for the week to be included. Each Class Member's pro rata distribution from the Maximum Settlement Payout will be determined by multiplying the Weekly Payout by the total number of qualifying weeks he or she worked in a qualified position during the Claim Period.

Any Class Member whose qualifying workweeks do not exceed two (2) weeks will receive no payment. This exclusion of *de minimis* claims is based on the cost of processing individual claims and estimated overtime hours actually worked by Class Members with such limited tenure.

Promptly following the period for submitting a Claim Form the Settlement Administrator will determine the amount to be distributed to each individual Class Member, other than those with *de minimis* claims.

All payments to individual Class Members shall be allocated as follows: fifty percent (50%) of each such payment shall be allocated to the payment of unpaid wages and fifty percent (50%) of each such payment shall be allocated to the payment of claimed penalties and interest. Any

1 amounts estimated to be owed by individual Class Members as employees to federal or state taxing  
2 authorities arising from distribution of the Settlement Amount allocated to unpaid wages, including  
3 any amounts owed for employee income taxes or the employee's share of Social Security and/or  
4 FICA taxes (*i.e.*, standard payroll withholdings) will be deducted from each individual Class  
5 Member's distribution/Settlement Amount. Any corresponding monies owed by Defendant, as the  
6 employer, to federal or state taxing authorities for the employer's share of any Social Security and/or  
7 FICA taxes, will be the separate responsibility of DES and will not be paid from the Maximum  
8 Settlement Payout or borne by Class Members. No amounts shall be withheld from a Class  
9 Member's allocation representing settlement proceeds attributable to penalties and interest.

#### 10 **6. Disputed Claims**

11 In the event that any discrepancy or any dispute arises between a Class Member and  
12 the Settlement Administrator regarding the total number of qualifying weeks worked by the Class  
13 Member during the Claim Period, which cannot be resolved between them, such claim(s) shall not  
14 be paid until it is reviewed by the Settlement Administrator. The burden shall fall on the Class  
15 Member to produce documents or other evidence affirmatively rebutting the information provided by  
16 Defendant and the conclusions reached by the Settlement Administrator. All such claims will be  
17 reviewed and decided within thirty (30) days following the period for submission of a Claim Form.  
18 The Settlement Administrator shall review all Dispute Letters and decide their validity, which  
19 decision shall be final. The Settlement Administrator may consult with Class Counsel and/or  
20 Defense Counsel as part of the process of determining the validity of any discrepancy or dispute.

#### 21 **7. Accounting And Final Report To The Court**

22 The Settlement Administrator shall provide the parties with weekly reports showing  
23 the numbers of claims submitted, numbers of opt outs, number of workweeks claimed and other  
24 claims-related data. The Settlement Administrator shall provide Class Counsel with such relevant  
25 data and a declaration as needed to enable Class Counsel to prepare for a Motion for Final Approval,  
26 including approval of Attorneys' Fees and Costs. However, the Settlement Administrator shall not  
27 provide Class Counsel with the addresses or social security numbers of Class Members except as  
28 otherwise called for in the Agreement or as necessary to effectuate the terms of the Agreement.

Within ten (10) days after the last day to submit claim forms, or at such later date as the Court may set, the Settlement Administrator shall provide to Defense Counsel and Class Counsel a sworn declaration setting forth the following:

(a) The names of all persons who were sent the Class Notices described in Section III.C;

(b) The names of all persons who opted out;

(c) The names of all persons who filed valid and timely Claim Forms, and the amount to be paid to each of them; and

(d) The names of all persons who submitted Claim Forms that were contested and the ruling as to each.

Within ten (10) days thereafter, Defense Counsel shall file a declaration with the Court setting forth the names of the Class Members who opted out.

The Settlement Administrator shall provide a declaration to Class Counsel regarding the claims process as required for Class Counsel to prepare and file a Motion for Final Approval.

#### **8. Appeal From Judgment**

If an objecting Class Member files a notice of appeal of the judgment within the time limit prescribed by law, no monies shall be paid to Class Members or Class Counsel until further order of the court permits or requires such payment, or as otherwise set forth in this Agreement.

#### **9. Payment**

The Settlement Administrator shall tender payment of appropriate monies to each Class Member, if any, who is entitled to receive payment under the terms of the settlement within thirty (30) days after the Effective Date. Monetary payments to Class Members will be made in the form of a check. The account from which the checks will be drawn will remain open for one hundred twenty (120) days after the check are mailed. Any outstanding checks will be void if not cashed 120 days after it is mailed to the Class Member. Payment to the Settlement Administrator, Class Counsel and Plaintiffs shall be made as set forth in Section II.E.2-4. Within thirty (30) days of the end of the one hundred twenty (120) day "check void" period, all funds that have not been distributed under this agreement shall be returned to Defendant.

1                   **F.       Additional Settlement Information**

2                   At Section III.E.5., *supra*, a settlement payment structure is stated that has two  
 3 elements requiring explanation. First, a double financial benefit is being provided for each qualifying  
 4 workweek between the period December 11, 2003 and May 7, 2004 because for the later period of  
 5 May 7, 2004 through May 7, 2006 Class Members have already received financial payments from  
 6 Defendant pursuant to its agreements with the United States Department of Labor covering purported  
 7 overtime violations during that specific two year period of time. The parties hereto represent that  
 8 Class members employed as Pumper Drivers during that two year period of time have been paid all  
 9 sums required due under the DOL arguments, except for those amounts due to unlocatable employees  
 10 which have been paid to the DOL. The aggregate amount of payments made by Defendant under the  
 11 DOL agreement is approximately Three Hundred Fifty Thousand (\$350,000.00).

12                   Second, the calculations herein begin on December 11, 2003 in response to a prior  
 13 lawsuit, Juan Mendoza, et al. v. Diamond Environmental Services, Inc., United States District Court  
 14 Case No. 07-CV-0056-BTM-POR, which was initially commenced on December 11, 2006. That  
 15 action was never certified as a class action and remained pending in United States District Court  
 16 until settled by the parties. Attached hereto as Exhibit "A" is a true and correct copy of the  
 17 stipulation and order regarding settlement agreement concluding that litigation. Because of the  
 18 earlier filing date of that purported representative action, the parties have agreed to begin the class  
 19 period continued in this settlement on a date three years prior to that earlier filed action.

20                   **G.       Public Statements**

21                   Plaintiffs, Defendant, Class Counsel, and Defense Counsel shall issue no public  
 22 statements or press releases with respect to the Litigation or the Settlement, except as required by  
 23 law or reasonably necessary to Defendant's legitimate business interests and operations. Except as  
 24 set forth herein, in the event of an inquiry by the press concerning the Litigation or the Settlement,  
 25 including this Agreement, the only statement that Plaintiffs, Defendant, Class Counsel, and Defense  
 26 Counsel may make, if any, is: "The parties have amicably resolved any differences concerning  
 27 Plaintiffs' lawsuit against Diamond Environmental Services, Inc." Nothing may be said, written, or  
 28 reported to the press unless explicitly agreed in writing, signed by Plaintiffs, Defendant, Class

Counsel, and Defense Counsel, or as otherwise permitted by this Section. Class Counsel may not state or reference on their respective websites or other promotional literature any reference to Defendant or to any sum paid in settlement of this matter, and shall not provide any details of the settlement. This provision shall not restrict Class Counsel from referencing this settlement in general terms in any declarations or motions in other cases handled by said counsel for purposes of showing or attempting to show Class Counsel's adequacy to represent a class in some other case.

#### **H. Judgment, Dismissal, And Injunction Against Future Actions**

Upon Final Approval of the Settlement, a Judgment and Dismissal With Prejudice on Approval of Settlement Agreement in the form attached hereto as Exhibit D (the "Judgment and Dismissal") shall be entered in the Litigation. Within three (3) days after receipt of the Judgment and Dismissal by Class Counsel, Class Counsel shall furnish a copy of the Judgment and Dismissal to the Settlement Administrator and Defense Counsel. Other than those who timely opt out, as described above, all Class Members, including Plaintiffs, shall be enjoined from pursuing and/or seeking to reopen claims of any type based upon the conduct alleged in the Complaint, in the Litigation and/or covered by the releases in Sections V.B. and V.C.

#### **I. Summary Timetable of Settlement Process**

The following proposed summary timetable is intended to summarize and be consistent with the corresponding dates and deadlines set forth elsewhere in this Agreement. To the extent there are differences, this summary timetable shall not control.

<i>Event</i>	<i>Timing</i>
Defendant provides list of Class Members to Settlement Administrator. Defendant certifies it has provided list. <i>Stip Section III.C.1</i>	15 days after Preliminary Approval.
Claims Administrator Mails Class Notice and Claim Form to Class Members. <i>Stip Section III.C.2</i>	20 days after receipt by Settlement Administrator of Class Member Information.
Deadline to file claims, opt out, and object when Notice packet is not returned by Post Office. <i>Stip Section III.C.4.a-c</i>	45 days after mailing of Class Notice by Settlement Administrator.



<i>Event</i>	<i>Timing</i>
Claims Administrator provides to Counsel declaration of Mailing Class Notice and Claim Form. <i>Stip Section III.C.3</i>	50 days after receipt by Settlement Administrator of Class Member Information.
Class Counsel files Claims Administrator declaration. <i>Stip. Section III.C.3</i>	5 days after receipt by Class Counsel of Claims Administrator's declaration
Final Approval Hearing. <i>Stip Section III.D.</i>	Approximately 90 days after mailing of Class Notice by Settlement Administrator.
Settlement Administrator or Defendant mails checks to Claimants, Attorneys and Plaintiffs. <i>Stip Section III.E.3-5</i>	30 days after Effective Date.
Settlement Administrator provides to Counsel declaration of accounting. <i>Stip Section III.E.7.</i>	10 days after last day to submit claims.
Defense Counsel files declaration of opt-outs. <i>Stip Section III.E.</i>	10 days after receipt by Defense Counsel of Settlement Administrator's declaration.

#### IV. LIMITATIONS ON USE OF THE SETTLEMENT

##### A. No Admission Of Fault

Neither the acceptance by any Defendant of the terms of this Agreement nor any of the related negotiations or proceedings is or shall be construed as or deemed to be evidence of an admission by any Defendant of the representative character of the Litigation, the validity of any of the claims that were or could have been asserted by any of the Class Members in the Litigation, or the liability of any Defendant in the Litigation. Defendant denies all liability for claims asserted in the Complaint. Defendant does not concede that any wages that are the subject of this Settlement are due. It is Defendant's position that it took reasonable steps to ensure that all meal and rest periods were taken, and that at all times the Class Members were properly compensated. Defendant does not concede any wage, penalty or other sum is owing to any Class Members.

##### 1. No Collateral Attack

This Agreement shall not be subject to collateral attack by any Class Member or any recipient of the Class Notice after the Judgment and Dismissal is entered. Such prohibited collateral

attacks shall include claims that a Class Member failed to timely receive Class Notice or any other reason.

## **B. Nullification Of The Agreement**

### **1. Due To Court Disapproval**

If (1) the Court should for any reason fail to approve this Settlement in the form agreed to by the Parties, (2) the Court should for any reason fail to enter the Judgment and Dismissal, or (3) the Judgment and Dismissal is reversed or rendered void by any Court of competent jurisdiction, then: (A) this Settlement shall be considered null and void, (B) neither this Settlement nor any of the related negotiations or proceedings nor any other existing document which purports to memorialize any settlement by and between the parties shall be of any force or effect, and (C) all Parties to this Settlement shall stand in the same position, without prejudice, as if the Settlement had been neither entered into nor filed with the Court (with the exception of any legitimate expenses incurred by the Settlement Administrator prior to that time). Invalidation of any material portion of this Settlement shall invalidate this Settlement in its entirety unless the Parties agree in writing that the remaining provisions shall remain in full force and effect.

### **2. Due To Court Modification**

If the Court enters any material condition to the Settlement that differs from this Agreement (except for any reduction in fees or costs awarded to Class Counsel or Plaintiffs) and has not been agreed to by Plaintiffs and Defendant as a result of the Final Fairness and Approval Hearing or otherwise, Plaintiffs and/or Defendant shall have the option to rescind the Settlement Agreement and resume the Litigation if either disagrees with any such condition.

### **3. Due To Opt Outs**

If ten percent (10%) or more of Class Members timely opt out from the Litigation and/or if ten percent (10%) or more of the total value of claims and/or workweeks are subject to timely opt out from the Litigation, Defendant shall have the option of withdrawing from the Settlement and, if Defendant withdraws, the Settlement Agreement shall be null and void.

1                   **4. Due To Appeal**

2                   In the event of a timely appeal from the Judgment and Dismissal, the Judgment shall  
3 be stayed and neither the Settlement Amount nor any other payment shall be distributed pending the  
4 completion or dismissal of the appeal.

5                   **5. Effect Of Nullification**

6                   If this Settlement Agreement becomes null and void for any reason, the Parties'  
7 agreement to conditionally certify the Class, as set forth in Section III.B., shall be vacated  
8 immediately.

9                   **V. MISCELLANEOUS**

10                  **A. Amendments**

11                  The terms and provisions of this Agreement may be amended only by a written  
12 agreement which is both (1) signed by the Parties who have executed this Agreement and  
13 (2) approved by the Court.

14                  **B. Class Member Release**

15                  Upon the entry of Judgment in the Litigation, each and every Class Member shall be  
16 bound by this Agreement and shall have exclusive recourse to the benefits, rights, and remedies  
17 provided hereunder, with the exception of individuals who have opted out of the Class. Class  
18 Members (other than those who have opted out of the Class) hereby fully and finally release and  
19 discharge Defendant, its parent, subsidiary, and affiliated corporations and entities, and each of  
20 its/their respective officers, directors, agents, employees, partners, attorneys, insurers, and  
21 shareholders, and all of their respective predecessors, successors, and assigns (collectively referred  
22 to as the "Released Parties"), from any and all claims, charges, complaints, liens, demands, causes of  
23 action, obligations, damages and liabilities, known or unknown, suspected or unsuspected, that each  
24 Class Member had, now has, or may hereafter claim to have against the Released Parties arising out  
25 of, or relating in any way to, any and all wage-and-hour-related claims arising during the Claim  
26 Period that were asserted in the Litigation, or relating in any way to any and all claims that could  
27 have been asserted in the Litigation based on the facts and circumstances alleged in the operative  
28 Complaint in the Litigation, regardless of whether such wage-and-hour-related claims arise under

1 federal, state and/or local law, statute, ordinance, regulation, common law (including, but not limited  
 2 to, the Fair Labor Standards Act, 29 U.S.C. § 201, et seq. (the “FLSA”), the Portal to Portal Act, 29  
 3 U.S.C. § 251, et seq., (“the Portal to Portal Act”), the Employee Retirement Income Security Act of  
 4 1974, 29 U.S.C. § 1001 *et seq.*; (“ERISA”), the Private Attorneys General Act of 2004, California  
 5 Labor Code section 2699, (the “PAGA”) or other provisions of the California Labor Code, the  
 6 applicable Wage Orders of the Industrial Welfare Commission, and/or the California Business and  
 7 Professions Code), or other source of law, and inclusive of any and all claims for damages, wages,  
 8 overtime pay, premium pay, waiting-time penalties, all other statutory penalties and damages,  
 9 including liquidated damages, all claims for improper deductions from wages under California Labor  
 10 Code section 221, all claims for missed meal periods and rest breaks under California Labor Code  
 11 sections 226.7 and 512 and the applicable Wage Order, all claims for improper wage statements  
 12 under California Labor Code section 226(e) unfair business practices and unfair competition and/or  
 13 restitution, disgorgement of profits and all other forms of relief, including equitable relief, available  
 14 under the California Labor Code, the California Business and Professions Code section 17200 *et*  
 15 *seq.*, and the FLSA, and all other alleged wage-and-hour-related violations, attorneys’ fees and costs,  
 16 or injunctive and declaratory relief, whether sounding in contract or tort and whether pursuant to a  
 17 statutory remedy; and any and all other claims or allegations raised in the Litigation, or based on any  
 18 of the facts, transactions, events, occurrences, acts, disclosures, statements, omissions or failures to  
 19 act that relate to or arise out of, in any way, the claims made and facts alleged in the Litigation (the  
 20 “Released Claims”). The Released Claims include, but are not limited to, claims arising from or  
 21 dependent on alleged violations of the California Labor Code; the Wage Orders of the California  
 22 Industrial Welfare Commission; California Business and Professions Code section 17200 *et seq.*; the  
 23 California common law of contract and tort; the FLSA; ERISA; and the Portal to Portal Act. In this  
 24 regard, the Settling Parties agree that there is a *bona fide* dispute regarding all claims asserted in the  
 25 Litigation, including Class Members’ claims for unpaid wages, overtime and penalties, and thus such  
 26 disputed wage claims are the proper subject of this Release.

27 Class Members also acknowledge that they are not “aggrieved employees” for the  
 28 purposes of the PAGA, and that Defendant is not liable for any penalties pursuant to the PAGA.



Class Members further acknowledge that none of the amounts paid under this Agreement constitute compensation under any "Employee Benefit Plan" as defined by section 3(3) of ERISA; and waive any and all claims for additional contributions to and/or benefits under any Employee Benefit Plan maintained or sponsored by Defendant based on any amount paid under this Agreement; and releases any claim for employee benefits, including any claim arising under ERISA arising out of, or related to, the amounts paid under this Agreement.

For purposes of this Section V.B., Plaintiffs shall be considered Class Members and expressly bind themselves to the Class Member Release in addition to the global release set forth below in Section V.C.

### **C. Plaintiffs' Release And Promise Of No Future Employment**

In exchange for receiving the incentive payment and other consideration, Plaintiffs hereby fully and finally release and discharge the Released Parties (defined in Section B, above) from any and all of the Released Claims (defined in Section B, above) and from any and all other claims, charges, complaints, liens, demands, causes of action, obligations, damages and liabilities, known or unknown, suspected or unsuspected, that the Plaintiffs had, now have, or may hereafter claim to have against the Released Parties, specifically, but not exclusively, all claims arising out of, or relating in any way to, Plaintiffs' hiring by, employment with, separation of employment with, or otherwise relating to, the Released Parties arising or accruing from the beginning of time up through the date of Preliminary Approval ("Plaintiffs' Released Claims"). Plaintiffs' Released Claims include, but are not limited to, claims arising from or dependent on the California Labor Code, including but not limited to the Private Attorneys General Act of 2004, California Labor Code section 2699, (the "PAGA"); the Wage Orders of the California Industrial Welfare Commission; California Business and Professions Code section 17200 *et seq.*; the California Fair Employment and Housing Act, Cal. Gov't Code § 12900 *et seq.*; the California common law of contract and tort; Title VII of the Civil Rights Act of 1964; the Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq.*; the FLSA; ERISA and the Portal to Portal Act.

Plaintiffs also acknowledge that they are not "aggrieved employees" for the purposes of the PAGA, and that Guess is not liable for any penalties pursuant to the PAGA.



1 Plaintiffs also acknowledge that none of the amounts paid under this Agreement  
 2 constitute compensation under any "Employee Benefit Plan" as defined by section 3(3) of the  
 3 ERISA; and waive any and all claims for additional contributions to and/or benefits under any  
 4 Employee Benefit Plan maintained or sponsored by Defendant based on any amount paid under this  
 5 Agreement; and releases any claim for employee benefits, including any claim arising under ERISA  
 6 arising out of, or related to, the amounts paid under this Agreement.

7 Plaintiffs promise never to apply for employment or reinstatement at Defendant.  
 8 Plaintiffs agree that Defendant is entitled to and may immediately reject without cause any  
 9 application by them for employment, reemployment, new benefits or reinstatement.

#### 10 **D. Waiver Of Civil Code Section 1542 By Plaintiffs**

11 Plaintiffs expressly agree that all rights under Section 1542 of the Civil Code of the  
 12 State of California are hereby waived as to all claims for Plaintiffs. Section 1542 provides:

13 A general release does not extend to claims which the creditor does not  
 14 know or suspect to exist in his or her favor at the time of executing the  
 15 release, which if known by him or her must have materially affected  
 his or her settlement with the debtor.

16 Plaintiffs fully understand the language of Civil Code Section 1542, and with this understanding,  
 17 nevertheless elect to, and do, assume all risks for claims that have arisen, whether known or  
 18 unknown, from the subject of this Release, and specifically waive all rights that they may have under  
 19 Civil Code Section 1542 regarding the Litigation. Plaintiffs fully understand that if the facts relating  
 20 in any manner to the release and dismissal or any claim released thereby are found hereafter to be  
 21 other than or different from the facts now believed to be true, they expressly accept and assume the  
 22 risk and agree that this Agreement and the releases set forth in Sections V.B. and V.C. shall remain  
 23 effective.

#### 24 **E. Assignment**

25 None of the rights, commitments, or obligations recognized under this Agreement  
 26 may be assigned by any Party or Class Member without the express written consent of each other  
 27 Party hereto. The representations, warranties, covenants, and agreements contained in this  
 28

Agreement are for the sole benefit of the Parties and the Class Members under this Agreement, and shall not be construed to confer any right or to avail any remedy to any other person.

#### **F. Governing Law**

This Agreement shall be governed by, construed, and interpreted, and the rights of the Parties determined in accordance with the laws of the State of California, irrespective of the State of California's choice of law principles. This Agreement shall be interpreted in accordance with the plain meaning of its terms and not strictly for or against any of the parties hereto.

#### **G. Entire Agreement**

This Agreement, including the Exhibits referenced herein which form an integral part hereof, contains the entire understanding of the Parties hereto with respect of the subject matter contained herein. In case of any conflict between text contained in Articles I through V of this Agreement and text contained in Exhibits to this Agreement, the former shall be controlling. There are no restrictions, promises, representations, warranties, covenants, or undertakings governing the subject matter of this Agreement other than those expressly set forth or referred to herein. This Agreement supersedes all prior agreements, including the Settlement Term Sheet and understandings among the Parties hereto with respect to the settlement of the Litigation.

#### **H. Waiver Of Compliance**

Any failure of any Party hereto to comply with any obligation, covenant, agreement, or condition herein may be waived only expressly in writing, to the extent permitted under applicable law, by the Party or parties hereto entitled to the benefit of such obligation, covenant, agreement or condition. A waiver or failure to insist upon strict compliance with any representation, warranty, covenant, agreement, or condition shall not operate as a waiver of, or estoppel with respect to, any subsequent or other failure.

#### **I. Notice**

If not otherwise specified, all notices, requests, demands and communications required or permitted to be given pursuant to this Agreement shall be in writing, and shall be delivered personally or mailed, postage prepaid, by first class mail to Class Counsel and Defense Counsel.

**J. Representation By Counsel**

The Parties acknowledge that they have been represented by counsel throughout all negotiations which preceded the execution of this Agreement and that this Agreement has been executed with the consent and advice of counsel.

**K. Binding On Successors And Agents**

This Agreement shall be binding upon the Parties and upon their heirs, administrators, representatives, executors, successors, and assigns, and shall inure to the benefit of said parties and each of them and to their heirs, administrators, representatives, executors, successors, and assigns.

**L. Continuing Jurisdiction**

The San Diego County Superior Court, North County Judicial District, shall have the sole and continuing jurisdiction to construe, interpret, and enforce the provisions of this Agreement, to supervise the administration and distribution of the Settlement Amount, and to hear and adjudicate any dispute or litigation arising from alleged breaches of this Agreement.

**M. No Other Attorneys' Fees, Costs, And Expenses**

Except as otherwise provided herein, the parties shall bear responsibility for its/their own attorneys' fees, costs, and expenses, taxable or otherwise, incurred by them or arising out of this litigation and shall not seek reimbursement thereof from any party to this Agreement. Notwithstanding the foregoing, the Parties reserve the right to seek attorneys' fees for breaches of this Agreement in accordance with applicable California law.

**N. Untimely Payment Provision**

If Defendant fails to pay any amounts due under this Settlement Agreement within the time provided, Class Counsel shall provide written notice to Defendant, Defendant's counsel and the court. Upon receipt of said notice, Defendant shall have five (5) business days to cure said failure. If Defendant does not cure the failure within the specified time, all such amounts due shall be subject to ten (10) percent annual interest beginning the date of Class Counsel's notice and continuing until paid in full. Should any legal action be brought to enforce this provision, the prevailing party shall be entitled to recover reasonable attorneys fees and actual costs.

**O. No Solicitation of Settlement Objections or Exclusions.**

The Parties agree to use their best efforts to carry out the terms of this Agreement. None of the Parties or their counsel will: (1) seek, or solicit or otherwise encourage Class members to submit written objections to the Settlement or requests for exclusion from the Settlement Class; (2) support any objections to the fairness of the settlement or appeal from the Court's Final Judgment approving the Settlement; or (3) file any objections, criticism or otherwise seek to reduce or modify any of the terms of this Agreement.

**P. Counterparts**

This Agreement, and any amendments hereto, may be executed in any number of counterparts and any Party hereto may execute any such counterpart, each of which when executed and delivered shall be deemed to be an original and all of which counterparts taken together shall constitute but one and the same instrument. It shall not be necessary in making proof of this Agreement or any counterpart hereof to produce or account for any of the other counterparts.

KEEGAN &amp; BAKER, LLP

Dated: 8-30, 2007By: 

JASON E. BAKER  
PETER KARVELIS  
BRENT JEX

Attorneys for Plaintiffs and Class Members

Dated: 8-30, 2007By: 

KEVIN HERNANDEZ  
Individually and on behalf of the Class

Dated: 08/30/07, 2007By: 

RAPHAEL CERVANTES  
Individually and on behalf of the Class

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LITTLER MENDELSON  
A Professional Corporation

Dated: \_\_\_\_\_, 2007

By: \_\_\_\_\_  
JOHN S. ADLER  
Attorneys for Defendants DIAMOND  
ENVIRONMENTAL SERVICES, INC.  
and ERIC DE JONG

DIAMOND ENVIRONMENTAL  
SERVICES, INC.

Dated: \_\_\_\_\_, 2007

By: \_\_\_\_\_  
ERIC DE JONG  
President and Chief Operating Officer

Dated: \_\_\_\_\_, 2007

By: \_\_\_\_\_  
ERIC DE JONG  
Individually-named Defendant